SUPREME COURT, U. S.

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IN THE

Supreme Court of The United States

October Term, 1969

No. 525

DONALD F. WELLING,

Petitioner,

v.

NORMA A. WELLING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA AND MOTION FOR A SUMMARY REVERSAL

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA AND MOTION FOR A SUMMARY REVERSAL

OPINIONS BELOW

The opinion of said Appellate Court is reported in 245 N.E. (2d) 173; and a copy is attached hereto in Appendix p. 8 infra.

This opinion reversed the decision of Boone Circuit Court of Boone County, Indiana, granting this Petitioner a divorce. The judgment is reported verbatim in the Appellate opinion, supra (A-9).

Thereafter, the Petitioner filed his Petition For Rehearing in the Appellate Court. This was denied on April 3, 1969, without an opinion. A copy of the denial is in A-6 infra.

Petitioner next filed his Petition To Transfer the case from the Appellate Court to the Supreme Court of Indiana, which is the highest tribunal in the State. The Supreme Court denied the Petition To Transfer on June 5, 1969, without an opinion (A-6).

JURISDICTION

This petition is for a Writ of Certiorari to the Appellate Court of Indiana, to review their decision in the Welling Divorce Appeal, which decision was entered on March 5, 1969.

The Petitioner filed his Petition For Rehearing on March 24th 1969. (A-18) infra. The federal question of denial of equal protection of the law and of due process of law was set forth in said petition in Paragraph VI (A-42).

The Petition For Rehearing was denied on April 3, 1969, without an opinion (A-6).

On April 23, 1969, Petitioner filed his Petition To Transfer the case to the Supreme Court of Indiana (A-43), which is the highest tribunal in the State of Indiana. The Supreme Court denied the Petition To Transfer on June 5, 1969, without an opinion (A-6).

Petitioner now files this Petition For Writ Of Certiorari and Motion For Summary Reversal of said Appellate Court decision; and files the same in this Court within 90 days from June 5th, 1969, which was the date the Indiana Supreme Court denied the Petition.

The jurisdiction of this Court is invoked under U.S.C.A. Title 28, Section 1257 (3) (A-5) for a writ of certiorari to review the decision of a State Court. The basis for the writ, is that said decision deprived this Petitioner of equal protection under the law and denied him due process of law as a citizen of the State and the United States. This deprivation violated his constitutional rights under the 14th Amendment of the Constitution of the United States (A-4). Further, said violation invoked the powers of this Court to review said decision of a State Court, under Rule 19 (1) (a) of the Rules Of The Supreme Court of the United States (A-5).

THE QUESTIONS PRESENTED

The question presented is, whether the Appellate Court denied Petitioner due process of law and equal protection under the law, when the Court practised invidious discrimination against him in their decision because he was successful in his third divorce action. Whether this prejudice denied him his constitutional rights, in that the Court did not follow the laws of the State; and which laws, if followed, would have protected him. Whether his case was given the same appellate treatment that is afforded to every other citizen of the State, who has a divorce case on appeal.

THE CONSTITUTIONAL PROVISION INVOLVED

The present case involves the 14th Amendment to the Constitution of the United States, and it is set forth verbatim in A-4 infra.

A CONCISE STATEMENT OF THE FACTS

Although brevity is desired, a review of the history of events in the past four years, is necessary, in order to understand the issues herein. (See Calendar of Events (A-1) infra.)

The parties are now 52 years of age. They married in 1936 and separated on Sunday, August 15, 1965. They have not lived together nor contacted each other since. Three sons were born of this marriage, but they are adults; married and have homes of their own.

Since the date of separation; except for a period of 42 days, these parties have been in continuous litigation as the above calendar shows.

On August 16, 1965, he filed for divorce in the Marion County Circuit Court, alleging cruel treatment, after he learned that she had secretly removed all their monies from the Bank, in the approximate sum of $2000.

She immediately filed for support and suit money. The Court ordered her to pay herself $75 a week out of the monies taken. She cross filed for a Separation From Bed And Board for a period of 5 years and for a permanent restraining order keeping him away. She alleged he was habitually cruel to her. He replied that if there was any cruelty it was provoked and justified. On November 4, 1965 the Court tried the case and denied the complaint and the cross-complaint. This decision adjudicated and put at rest all claims either had against the other to the date of the judgment.

On November 12, 1965, he filed his second action for divorce in the Superior Court No. 5 of Marion County, Indiana, alleging cruelty in that she secretly kept the

monies and would not share or account for same. She immediately filed for support and attorney fees and was awarded $50 a week, which he was ordered to pay, plus her attorney fee. He asked for a change of venue and the case went to Johnson County. She filed a demurrer stating he had no cause of action. He stopped further support payments by withholding the weekly bank checks until the Court ruled on the demurrer. She filed an answer on the day of trial, in denial and claiming he was in contempt for not paying the weekly support from January, 1966 to June 17, 1966. The Court tried the case on June 17, 1966 and denied the divorce; and found that during the second divorce interval, she had spent certain of his monies and set this sum off against the support order, and directed him to pay the difference of $810 to her. This decision was handed down on August 18, 1966. He attempted to file a Motion For A New Trial but local counsel forgot to file it. He then filed a Motion To Vacate the judgment. The Court overruled this on October 17th, 1966, and he mailed her check of $810 on October 26, 1966, plus her attorney fees.

On the same date she filed her "dessertion" action in Superior Court No. 6 in Marion County, claiming he had failed and refused to support her since August, 1965. She joined his employer General Motors Corporation, as a co-defendant, who employed counsel and entered an appearance in the case. On December 5, 1966, he filed his Motion To Strike the "dessertion complaint" as a sham plea, showing the support of $240 a month plus the house that he had provided her with since they separated. On February 1, 1967, she Amended her dessertion action and repeated the same charges verbatim. This time she joined his insurance company and his bank as additional defendants.

On November 30, 1966, he filed his third action for divorce in Marion County Superior Court No. 7 claiming cruel and inhuman treatment because of the false charges of non support and in making his employer a party to their marital strife. She immediately filed for support and he was ordered to pay her $60 a week. She moved for a change of venue and the case went to Boone County, Indiana, at her request. The case was tried by Court on June 30, 1967. The Court entered a judgment on August 1, 1967, granting him a divorce and awarding her the house and furniture and $15 a week for two years. She moved for a new trial and when denied, she took her appeal to the Appellate Court of Indiana, who reversed the trial court's decision. He filed for a Rehearing which the Appellate Court denied. Then he filed petition to transfer the case to the Supreme Court of Indiana, who denied said petition on June 5, 1969. He now brings this petition for certiorari.

HE RAISED THE FEDERAL QUESTION in Paragraph VI of his Petition for Rehearing (A-42), wherein he stated:

> "That said Appellate Court's failure to follow the above precedents of the Supreme Court denied this Appellee the equal protection of the law and due process of law in the review of this case on appeal." (A-42)

The Appellate Court denied the petition for rehearing without an opinion (A-6).

Petitioner then filed his Petition To Transfer to the Supreme Court of Indiana (A-43). The Supreme Court rules on Petitions To Transfer, do not provide for this type of question (A-7) so the federal question was raised in the Indiana Supreme Court by filing a Brief with the Petition

To Transfer and making the Petition For Rehearing a part of the petition. Page No. 17 of the Brief stated "The Appellee therefore incorporates said Petition as a part of this Brief, and it is attached hereto as 'Exhibit "A"' and made a part hereof." (The Brief is a part of the record transmitted to this Court by the Clerk.)

The Supreme Court on June 5, 1969, denied the Petition To Transfer the case, without an opinion, towit:

> "You are hereby notified that the Supreme Court has on this day: Appellee's petition to Transfer is hereby denied this 5th day of June, 1969. DeBruler, C.J."

The Supreme Court of Indiana, is the highest tribunal in the State of Indiana. (Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Peck (1909), 172 Ind. 562, 577.)

The Petitioner now brings this Petition For Writ Of Certiorari to the Supreme Court of the United States within 90 days from the rendition of the Supreme Court denial in the State of Indiana.

ARGUMENT

REASONS RELIED ON FOR WRIT AND MOTION FOR REVERSAL

I

The Decision Of The Appellate Court Conflicts With A Decision Of This Court; Declaring That A Citizen's Constitutional Rights Shall Be Protected From Invidious Discrimination By A State

The above ruling was rendered in B.A. Reynolds, etc. Et Al. vs M.O. Sims Et Al. (1964), 377 U.S. 506, 527; which stated that invidious discrimination against types of individuals by the State violates their constitutional rights of equal protection under the law.

The Petitioner is a citizen of the United States and of the State of Indiana by birth. Therefore he is entitled to the protection of the 14th Amendment of the Constitution of the United States (A-4) which protects his rights of due process of law and equal protection under the law from any encroachment by the State. (In re Kemmler (1890), 136 U.S. 436, 448, 449). The Kemmler case decided that "This constitutional right forbids any arbitrary deprivation of life, liberty or property and secures equal protection to all under like circumstances in the enjoyment of their rights and in the administration of justice. The State may not encroach against these fundamental rights."

In accordance with the above decisions, this Petitioner had a right to have his decree of divorce given the same uniform treatment on appeal as any other Indiana citizen

who was successful in the trial below. However, the Indiana Appellate Court arbitrarily discriminated against his cause of action and thus denied him due process of law and equal protection under the law, by holding that his two former divorce actions cast a stigma upon him and his cause of action.

The prejudice of the Court is patently apparent in their opinion, viz.:

> "This case represents the third attempt by the Appellee-Plaintiff, Donald F. Welling, to divorce himself from the the Appellant-Defendant, Norma A. Welling. * * * The legislature of this State has enacted strict restrictions upon the granting of a divorce and these restrictions preclude us from UPHOLDING THE GRANTING OF A DIVORCE TO A MAN WHO HAS TWICE FAILED ON OTHER GROUNDS AND ATTEMPTS A THIRD TIME ON THE BASIS OF HIS OBVIOUS UNILATERAL DESIRE FOR A DIVORCE and a lawful action for support brought by a wife." (A-17)

Petitioner contends that the above opinion of the Court arbitrarily discriminated against him and his cause of action because he had made two unsuccessful prior attempts to obtain a divorce. He further states that the law of res judicata applied to said former actions; and all parties, including the Appellate Court, were bound by the final decisions therein. In the case of Barker v. State, 244 Ind. 267, 271, the Court held: "The principle of res judicata does not permit the repeated litigation of matters settled by a final judgment."

His third successful divorce case was predicated on "other grounds" as stated in the Appellate opinion. These grounds arose after the second judgment. Indiana law

permits successive actions on new grounds, occurring after judgment. (Indiana Pipe Line Company v. Christensen (1931), 94 Ind. App. 155. 160.)

Therefore, res judicata applied to the two former actions; and the issues therein; and whether the respective Court was right or wrong in their denial of a divorce; had no bearing on the merits of the third action. Petitioner had a right to expect equal treatment of his third action the same as any other Appellee; and without prejudice by the Reviewing Court.

The prejudice of the Appellate Court is further reflected by their opinion, when they quoted the most damaging statement he made in the trial, viz.:

> "Q. So at the time of October the 26th when you claimed you were embarrassed by this false allegations of not supporting your wife you hadn't actually supported her from January of that year at any time until October 26th, (1966) is that correct?" (Record 138, 139) (A-16)
>
> A. That is correct.

and set this evidence out in the opinion. The Appellate Court failed to set out his immediately following explanation, viz.:

> "Q. You had provided her with a house all this time purchased with your monies had you not?
>
> A. That's right.
>
> Q. And you had provided her with all the savings account money that she withdrew on October 16, 1965, in the sum of $2,000 did you not?
>
> A. That right and I made the statement that that should have lasted twenty-five weeks and it only, and in thirteen weeks there was another hearing

and they ordered me to pay fifty dollars a week which there should have been some of that left even at $75 a week.

Q. And she was in possession of all, approximately all the worldly goods you possessed?

A. That's right." (Record 139) (A-23)

He had previously testified on direct examination, viz.:

"Q. Alright, now tell the Court how much she had from the period between August the 14th, 1965 until October 26th when she filed this accusation in 1966?

A. She had $3,640.85" (Record 111) (A-21)

It is obvious that the witness thought the question (the Court opinion recited) was directed to the weekly bank checks he withheld while waiting on the Court's ruling on the Demurrer.

In reaching for this unfavorable inference of purported non-support, the Appellate Court violated their own statements in their opinion, viz.:

"we must construe any such evidence in favor of the Appellee." (A-12)

"Taking this evidence most favorable to the Appellee-" (A-13)

Further, the Court violated a uniform appeal precedent towit:

"On appeal, we may not weigh the testimony of one witness against the conflicting testimony of another, nor may we weigh conflicting portions of the testimony of the same witness. If the same witness makes contradictory assertions we will not undertake to deter-

mine which of the assertions are true; that being a question for the jury."

Kraus v. Kraus, 235 Ind. 325, 328, 329 (1955).

It is lucidly clear, that the prejudice of the Court clouded their clear sense of justice, so that they were denying him, his best evidence. Further, the Appellate Court was taking the case away from the trial Court. This, they cannot do; according to the standards of the Court, towit:

"It has repeatedly been held by this court that we do not weigh evidence or disturb the decision of the trial court when it is supported by some evidence of probative value, notwithstanding the fact that the defendant's testimony shows different circumstances or set of facts. If there is any substantial evidence of probative value in the record to sustain the finding of the trial court, the judgment must be affirmed. In this connection it must be borne in mind that the trial judge as trier of the facts was not bound by the testimony of any single witness or any particular item of evidence. It was his exclusive province to judge and to determine the credibility of the parties, if either of them was entitled to a divorce. Considering this rule, therefore, upon appeal, this Court cannot substitute its judgment for that of the trial court."

Van Antwerp v. Van Antwerp (1954), 125 Ind. Ind. App. 65, 69, 70.

The Appellate Court of Indiana, in a divorce case where the wife took her husband's bonds and hid them, said:

"We know of no set formula or factual definition as constituting cruel and inhuman treatment within the statutory meaning thereof. Each case stands or falls upon its own circumstances as shown by the evidence. 'Cruel and inhuman treatment is a relative term and depends upon the circumstances of each particular

case. It may consist of a series of wrongs no one of which, in itself, would be grounds for a divorce . . .' The trial court has before it, within its sight and hearing the physical presence of the parties and oftimes their children. It hears their testimony, sincerity, emotions, inflections and tones of voice, apparent state of health, and experiences the tenseness of the human drama enacted there within the confines of the Courtroom. The appellant tribunal on the other hand, has before it only the cold written record. It sees only words, phrases, sentences, questions, answers and exhibits. It is without authority to weigh the evidence and determine only that the requisite principles of law have been observed and duly applied, and that justice has been fairly and impartially administered."

Wingard v. Wingard (1957), 128 Ind. App. 44, 45, 46.

In the case of Akins v. Texas (1945), 325 U.S. 398, 401, 402, it was held that "—the trier of the facts who heard the witnesses in full and observed their demeanor on the stand has a better opportunity that a reviewing court to reach a correct conclusion—."

In summation of the above proof, it is obvious that the Appellate Court was prejudiced against this Petitioner and his cause of action. Such prejudice was reflected in their arbitrary and invidious discriminating treatment of his cause of action. This deprived him of his constitutional right of due process of law and equal protection under the law.

II

Had The Court Followed The Law His Constitutional Rights Would Have Been Preserved

The third divorce action was based upon the statutory grounds of cruel and inhuman treatment. He alleged:

> "That since October, 1966, said defendant has been guilty of many and various acts of cruel and inhuman treatment towards this plaintiff, and among other things, has accused him falsely of failing to provide for her; has attempted to interfere with his employment by making said false accusations to plaintiff's employer; has attempted to make said employer a party defendant to their marital strife; all of which acts caused this plaintiff great mental anguish and created a permanent barrier between said litigants which no reconciliation is possible." (Record 4)

Her answer was in denial. The trial court found that he was entitled to a divorce. That she has been guilty of cruel and inhuman treatment towards him.

The Appellate Court said:

> "There is no evidence in this record from which the trial court could have determined that the wife's action in bringing the support action was malicious or in bad faith." (A-15) "However, the important point is that no evidence of such maliciousness or bad faith was present. We cannot hold that the single act of bringing a support action is cruel and inhuman treatment where there is no showing that the charge was made in bad faith or was malicious or unjustified and where there is a complete absence of any other conduct which could constitute such cruel and inhuman treatment." (A-17)

It becomes necessary herein to consider the pertinent evidence adduced in reviewing the Court's statements. The material parts are set forth in the Appendix (p. 46).

A syllabus thereof, shows: he said the accusations in her complaints, that he refused and failed to support her were false; (his Exhibit No. 1 was introduced, showing a certified copy of her support proceedings, i.e., the complaint

joining him and his employer; summons to employer; and attorneys for employer appear; also his Motion To Strike, showing that she had taken secretly, all their life savings out of the bank in the sum of $2,000; that she had received $1,100 support from the Court; which averaged out $250 a month since separation (A-29 and 48); her Amended complaint for support, wherein she again falsely accused him of failing to support or provide for her since August 14 1965; and this time she joined his bank and his insurance company as defendants. He testified the statements were false. That he had provided her with $3,640.85 when she filed the false accusation.) (Record 90-111) (A-38) That the bank accounts, the house etc. was all a result of his earnings. That she never worked. He stated that said charges caused him embarrassment. He was called into personnel and questioned how much support he had paid. This false charge came all the way back to his Supervisor. I was very much embarrassed. That no reconciliation was possible. (A-38)

On cross-examination he stated that the first divorce court awarded her $75 a week out of the savings account and that should have lasted 25 or 30 weeks, then he paid $50 a week in the second divorce action until Jan. 17, 1966, when she filed a demurrer. That he did not turn over the weekly bank checks to her until the Court overruled his motion to vacate the judgment of October 17, 1966. He then paid her the $810 arrearage on October 26, 1966. On Redirect examination he stated that the $810 payment was in addition to the $3,640.85 she had already received in support. That at the time she made the false charges he had provided her with support of $260 a month since their separation. That he was called into the office by his employer and they wanted to know why he was not supporting his wife at all. He had the check stubs showing that each week he had

taken her support out; that he didn't hold the money himself. THE PLAINTIFF THEN RESTED.

The Respondent introduced transcripts of the previous divorce proceedings as Exhibits B and C. She then testified on direct examination (A-52) that she received support payment on the 7th and 14th of January, 1966. That she received no more payments until the $810 payment in October, 1966.

On Cross-examination she stated she took all of their life savings out of the bank on August 16, 1965, and put her name on it. That she lived in the house continuously since their separation. That she did not work during their marriage. That his money bought the house. That he had paid everything that the Court had ordered. That after August 14, 1965, she received $75 a week support and she used it up out of the $2,000 bank account. That all the $2,000 didn't come from her husband; her son quit school and gave her $50 a month to do his washing and ironing. She didn't know how much. That her husband bought the groceries and provided the home when the son paid this. (A-52)

SUMMATION OF THE EVIDENCE

The issue was that her charges were false. He stated she received $260 a month. That her false charges embarrassed him and he was called before his employer, when the latter was made a defendant in her desertion action. She stated that she had received the $2,000 and had the use of the house. That he had paid all the Court had ordered. Her only defense was that he had not paid while the Demurrer was on file and until the Court overruled his motion to set aside the judgment. This covered a period from January 1966 to October, 1966.

His Exhibit No. 1 showed the complaint where she charged him of failing and refusing to support her from August 14, 1965. This complaint was filed October 26, 1966. On Nov. 30, 1966 he filed his third action stating said accusations were false. On Dec. 5, 1966 he filed his Motion To Strike, showing said accusations were false, that she had received $240 a month in support since August 14, 1965.

In spite of the truth of his two pleadings (the third complaint; and the Motion To Strike) *she proceeded on February 1, 1967, to repeat the same false charges all over again, after she had been warned twice before that they were false.* Further, as shown by her testimony she knew the statements were false (A-32 and 41 and 42). When she made the false charges in February, 1967, the $810 had been paid in October, 1966, and she was receiving $60 a week support from her third action. Even at the $260 a month figure, *she had received $4,420 in support when she made this last false accusation.*

Yet the Appellate Court found no malice or bad faith in her statements; which on both occasions, were identical, viz.:

> "2. That on or about the 14th day of August, 1965, Donald F. Welling deserted plaintiff without cause and without making adequate provisions for her support.
>
> 3. That thereafter, said Donald F. Welling has refused and failed to pay support to this plaintiff or to make any provisions for the support of this plaintiff." (Record 90-97) (Record 104-105) (A-20-49)

She made these false charges twice to his employer and in February, 1967 she made such false accusations to his bank and insurance company. The evidence showed that the Per-

sonnel Office knew of the charges, also his immediate Supervisor. He stated these false accusations embarrassed him very much.

Yet, the Appellate Court held "we cannot hold that the single act of bringing a support action is cruel and inhuman treatment where there is no showing that the charge was made in bad faith or was malicious or unjustified—" (A-17).

The Appellate Court, in other cases, has ruled:

> "Malice is the doing of a wrongful act intentionally and without just cause or excuse—the Court or jury MAY INFER MALICE from want of probable cause—malice may be IMPLIED UNDER CERTAIN CIRCUMSTANCES—malice is a question of fact for the jury, who may infer it from a want of probable cause —."
>
> Pontius v. Kimble (1914), 56 Ind. App. 144, 146.
>
> "Malice in fact is distinguished from malice in law in which the latter is required to be proved expressly while the former is inferred from the act, or, in cases slander, from the PUBLICATION OF THE FALSE LANGUAGE."
>
> Smith v. Rodecap (1892), 5 Ind. App. 78, 80.

The Indiana Supreme Court has held that "good faith is the opposite of bad faith, and bad faith and fraud are synonymous." (Hilgenberg v. Northup Et al. (1892), 134 Ind. 92, 94, citing Stark v. Starr, 1 Sawyer (U.S.) 15.)

The evidence showed conclusively that she made the false accusations knowingly; with deliberate intent to embarrass and harass him . . . Even her partial defense, that he had not paid the $810 when she filed the first action; was useless when she repeated the accusations in 1967. Further, she knew that the second divorce Court in its judgment, did not

find him in contempt of court for withholding the bank checks, but found that she had spent certain of his monies during the second divorce. That only $810 was due her; which gave half of the withheld checks back to him (A-47).

THE INDIANA LAW APPLICABLE ON APPEAL

The Supreme and Appellate Courts have established regular and uniform rulings on judicial matters on appeal, towit:

> The Court in determining whether there is sufficient evidence to sustain the verdict must take that view most favorable to appellees.
>
> Danville Trust Co. v. Barnett (1916), 184 Ind. 696, 701 (10 supporting cases cited) (West Indiana Digest Vol. 4, p. 605)

> Every inference of fact that can be adduced from the evidence considered in the light most favorable to the winning party will be sustained in favor of the verdict.
>
> Southern Products Co. v. Franklin Coil Hoop Co. (1914), 183 Ind. 123, 124. (4 supporting cases cited, p. 605)

> In determining whether there is evidence to sustain the finding, only the evidence and the inferences, direct and circumstantial, most favorable to the findings is to be considered.
>
> Fishbein v. Pennsylvania Glass Co. (1916), 184 Ind. 445, 446. (8 supporting cases cited, p. 619, supra)

> Reviewing Court will consider only evidence most favorable to prevailing party where evidence is conflicting.
>
> Menzenberger v. American State Bank (1936), 101 Ind. App. 600, 608 (3 supporting cases cited, p. 622 supra)

Every presumption is indulged in favor of the validity of the judgment of the lower court and it devolves upon the appellant to present reversible error before this Court is warranted in ordering a reversal.

Ross v. Illinois Glass Co. (1917), 64 Ind. App. 166, 169.

When the sufficiency of the evidence is questioned, we do not weigh the evidence, but will examine the record most favorable to the appellee to determine if there is any evidence, OR ANY LEGAL INFERENCE, which may be drawn therefrom which, IF BELIEVED BY THE TRIER OF THE FACTS, WOULD SUSTAIN THE VERDICT OR DECISION.

Watson Et Al. v. Watson, Et Al. (1952), 231 Ind. 385, 388.

Prima facie as we understand it, means such evidence as is sufficient to establish a given fact and which if not contradicted will remain sufficient.

Rene's Restaurant Corp. v. Fro-Du-Co. Corp. (1965), 137 Ind. App. 559, 564.

Where an ultimate material fact is to be inferred from other facts proved it is the province of the Court or jury trying the facts to draw the inferences and thus to find the ultimate fact. When the facts upon which the inference is based are of such a nature that reasonable minds might rightly draw opposite inferences therefrom, this court can not say that the fact found as a result of such inference is not sustained by the evidence. That can be done only in cases where the facts are undisputed and where the verdict of the jury or finding of the trial court is opposed to the only inference that can be rightly and reasonably drawn from such facts.

Western Union Telegraph Co. of Indiana v. Louisville and N.R. Co., 183 Ind. 258, 263.

The Petitioner contends, that the Appellate Court should have applied the above standards of law to his case, the same as any other Indiana Appellee, would have received.

The Petitioner had proved by a preponderance of the evidence that her accusations were false. Her defense was, that at least from the period of January, 1966 to October, 1966, her statement was true. However, she knew the second divorce Court found that she had spent certain of his monies even during this period. She never denied his statements that she had recived support of $260 a month ever since they separated. *Then in February, 1967; after she had been forewarned by his Motion To Strike and his Third Divorce complaint, that the charges were false; she repeated the same false accusations again.* He stated that her accusations embarrassed him and caused him to be called into the Personnel Office and be interrogated why he was not supporting his wife. According to the ruling of the Indiana Supreme Court in the Van Antwerp case, supra. *"Acts which tend to humiliate and degrade the other spouse constitute cruel and inhuman treatment."*

The trial Judge had the right to weigh the evidence and determine the credibility of the witnesses before him and to draw the inferences from either the direct or circumstantial evidence before him. According to the Watson case, supra, *if the Court drew any legal inference, which he believed tended to degrade and humiliate the Petitioner; then his decision would be sustained.* This is the rule in Indiana, when the sufficiency of the evidence is questioned. Further, the court on appeal, according to the rulings set forth above, should have held all presumptions and all favorable evidence for the petitioner, should be considered in favor of upholding the judgment of the trial court. As shown above, the Appellate Court did not take the favorable evidence into consideration; instead they considered

the worst interpretation. They went further, and weighed the evidence of his conflicting statements. Yet they said in their opinion "—we do not intend to change those established principles which restrict a reviewing court's intrusion into the trial court's domain of finding facts and weighing evidence—"(A-17).

Petitioner states that he had a right, protected by the 14th Amendment of the Constitution of the United States, which "—forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights—". This was the ruling in the case of In Re Kemler (1890), 136 U.S. 436, 448, 449.

That the Appellate Court did not treat his case like any other Indiana citizen on appeal; in that it did not follow the law announced in its own decision, i.e., contrary to the Court's statement, they did not take the most favorable evidence in the case; and, they proceeded to weigh the conflicting evidence.

Had this Court followed the law, the constitutional rights of this petitioner would have been protected. Petitioner incorporates here, his argument and authorities set forth in his Petition For Rehearing (A-18) infra.

III

The Decision Of The Indiana Appellate Court Invokes Rule 19 (1) (a) Of The United States Supreme Court

The denial of the federal question raised in the Petitioner's Motion For A Rehearing, supra, by the Appellate Court, is not in accord with the applicable decisions of the United States Supreme Court. The principles of these

federal decisions in the Kemler Case, supra; (which cited the U.S. v. Cruishank case, 92 U.S. 542) and the case of Akins v. Texas, supra, have already been set forth herein. The reasons are set forth in Points I and II above, and it would serve no useful purpose to reiterate them again. They are incorporated hereby by reference.

CONCLUSION

The Petitioner prays for a Writ Of Certiorari to the Appellate Court of Indiana to review their decision; and also moves the Court for a Summary Reversal of said decision.

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Attorney for Petitioner.

Of Counsel:

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APPENDIX

IN THE

Supreme Court of The United States

October Term, 1969

No. _____

DONALD F. WELLING,

Petitioner,

v.

NORMA A. WELLING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA AND MOTION FOR A SUMMARY REVERSAL

CALENDER OF EVENTS

August 15, 1965 (Sunday): Parties separate.

August 16, 1965: She secretly removes bank accounts.

August 16, 1965: He files for divorce in the Circuit Court of Marion County, Indiana.

August 24, 1965: She files for support pendente lite and a restraining order. She files Answer and Cross Complaint for Separation From Bed and Board For A Period Of Five Years and Permanent Restraining Order And Support.

September 10, 1965: Court orders her to pay herself $75 a week out of monies she took from bank.

November 4, 1965: Trial by Court. Court denies complaint and Cross Complaint.

November 12, 1965: He files second divorce action in Superior Court Room No. 5, Marion County, Indiana.

November 29, 1965: She files for support and attorney fees pendente lite.

December 10, 1965: Court orders him to pay her support of $50 a week and preliminary attorney fee.

December 27, 1965: He files Motion To Reconsider Support Order. Also Motion For Change Of Venue. Case venued to Johnson County Circuit Court.

February 15, 1966: She files contempt citation for failure to pay support.

March 7, 1966: He files motion to continue contempt hearing until trial date as she has all their worldly goods. Motion granted.

May 12, 1966: He files Motion for trial date.

June 17, 1966: She files Answer in Denial and failure to pay support.

June 17, 1966: Trial by Court.

August 18, 1966: Court denies divorce; finds she has spent certain of his monies; which should be deducted; orders him to pay $810 to her.

September 13, 1966: He attempts to file Motion For New Trial, but local counsel forgot to file it.

September 21, 1966: He files Motion To Vacate Judgment.

October 17, 1966: Court overrules Motion To Vacate.

October 26, 1966: He pays the $810 and $425 attorney fees.

October 26, 1966: She files statutory "dessertion action" in Marion County Superior Court Room 6.

November 30, 1966: He files third action for divorce in Superior Court No. 7 Marion County, Indiana.

December 5, 1966: He files Motion To Strike her "dessertion complaint."

December 8, 1966: She files for support and attorney fees.

December 20, 1966: Court orders him to pay $60 a week plus preliminary attorney fee of $150.

February 6, 1967: She files answer in denial and sets up former divorce actions and judgments. He replies that res judicata applies to former actions and estoppel.

February 6, 1967: She files Motion For Change Of Venue and case goes to Boone County, Indiana.

June 30, 1967: Trial by Court, taken under advisement.

August 1, 1967: Court grants divorce.

August 25, 1967: She files Motion For New Trial.

September 21, 1967: Court overrules Motion For New Trial.

October 6, 1967: She files Praecipe For Transcript.

December 18, 1967: Bill of Exceptions signed and filed.

APPELLATE COURT DOCKET

Norma Welling v. Donald F. Welling
No. 1267 A 110 Appeal From Boone County

(Pertinent Entries)

December 18, 1967: Transcript And Assignment Of Errors Filed.

February 9, 1968: Appellant files Brief.

April 9, 1968: Appellee files Brief.

May 22, 1968: Appellant files Reply Brief.

February 11, 1969: Oral Argument.

March 5, 1969: Judgment reversed.

March 24, 1969: Appellee Files Motion For Rehearing.

April 3, 1969: Appellee's Petition For Rehearing Denied.

April 23, 1969: Appelle Files Petition For Transfer.

June 5, 1969: Appellee's Petition To Transfer Denied.

July 3, 1969: Appellee files petition to withdraw transcript for appeal and notice of appeal with proof of service.

July 7, 1969: Petition To withdraw Transcript granted.

July 31, 1969: Appellee files Praecipe For Record, to forward to the U.S. Supreme Court.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

#1. Citizenship—Due Process of law—Equal Protection: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

RULES OF THE SUPREME COURT OF THE UNITED STATES

PART V. JURISDICTION ON WRIT OF CERTIORARI

Considerations Governing Review On Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) etc.

UNITED STATES CODE ANNOTATED TITLE 28

Section 1257 State Courts, Appeal, Certiorari: Final judgments or decrees rendered by the highest court of a State in which a decision can be had, may be reviewed by the Supreme Court as follows:—

(3) By writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in ques-

tion on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of a commission held or authority exercised under the United States.

DENIAL OF PETITION FOR REHEARING

(On Supreme Court Clerk Stationery, Kendal E. Mathews Clerk)

Norma A. Welling VS. Donald F. Welling, No. 1267A110

You are hereby notified that the APPELLATE Court has on this day Denied Appellees Petition for rehearing. Pfaff, C. J.

(SEAL) April 3, 1969

/s/ Kendal E. Mathews,
Clerk of Supreme and
Appellate Court.

DENIAL OF PETITION TO TRANSFER

(On Supreme Court Clerk Stationery, Kendal E. Mathews, Clerk)
Norma A. Welling VS. Donald F. Welling, No. 1267A110

You are hereby notified that the SUPREME Court has on this day Appellee's petition to Transfer is hereby denied this 5th day of June. DeBruler, C.J.

(SEAL) June 5, 1969

/s/ Kendal E. Mathews
Clerk of Supreme
And Appellate Courts.

INDIANA SUPREME COURT RULES

Rules 2-23. Transfers. A petition to transfer a cause from the Appellate Court to the Supreme Court shall be separate from the briefs in support thereof and shall be filed within twenty (20) days after a petition for rehearing has been denied. The petition shall set forth briefly:

(1) That the Appellate Court decided the case with a written opinion, giving the date when the opinion was filed;

(2) That the decision of the Appellate Court was against the party seeking the transfer;

(3) That a petition for a rehearing was filed with the Appellate Court in time and that a rehearing was denied, giving the date of such denial.

(4) That the opinion of the Appellate Court:

(a) contravenes a ruling precedent of the Supreme Court, including the ruling precedent;

(b) or that the opinion of the Appellate Court erroneously decides a new question of law, concisely stating the same;

(c) or that the Appellate Court failed to give a statement in writing of each substantial question arising on the record and the decision of the Court thereon. If this cause is relied on, the petition shall set out or exhibit so much of the record, assignment of errors, briefs and opinion as will affirmatively disclose such failure and establish that the petitioner was prejudiced thereby.

Briefs may be filed, etc.—"

APPELLATE COURT DECISION

IN THE
APPELLATE COURT OF INDIANA
DIVISION TWO

NORMA WELLING,
Appellant,

v.

DONALD F. WELLING,
Appellee.

FILED
MAR 5 1969

CAUSE NO.
1267-A-110

Appeal from the Boone Circuit Court
Honorable Charles F. Thompson, Judge

SHARP, J.—This case represents the third attempt by the Appellee-Plaintiff, Donald F. Welling, to divorce himself from the Appellant-Defendant, Norma A. Welling. The first divorce case was filed by the Appellee in the Marion Circuit Court on August 16, 1965, on the grounds of cruel and inhuman treatment and resulted in a judgment denying the Appellee a divorce entered on November 4, 1965. On November 12, 1965, the Appellee filed his second divorce action against the Appellant in Marion Superior Court, Room 5, which was later venued to the Johnson Circuit Court and resulted in a judgment entered August 18, 1966, denying Appellee a divorce. The second action for divorce was also based upon cruel and inhuman treatment. Additionally, on October 26, 1966, the Appellant filed a non-support action under Section 38-117, Burns Indiana Statutes Annotated (1949 Replacement) and named Appellee plus General Motors Corporation, and by later amendment, Indiana National Bank of Indianapolis, and Metropolitan Life Insurance Company, as parties defendant.

This instant action was commenced by the Appellee in Superior Court of Marion County, Room 7, on November 30, 1966, and was later venued to the Boone Circuit Court. The grounds alleged in this action were cruel and inhuman treatment in that Appellant "has accused him falsely of failing to provide for her, has attempted to interfere with his employment by making false accusations to Plaintiff's employer; has attempted to make said employer a party Defendant to their marital strife." The Appellee filed an answer in two legal paragraphs; the first, an admission and denial under Supreme Court Rule 1-3. The second paragraph of answer generally set out the pleadings and judgments in the two previous divorce actions brought by the Appellee. The Appellant filed a reply to the second paragraph of answer based generally on res judicata and estoppel. On August 1, 1967, the Boone Circuit Court entered the following judgment:

> "Comes now the parties in person and by counsel on this 9th day of June 1967, before the Honorable Charles F. Thompson, the regular presiding Judge of this Court, and this cause having been set for trial this date, upon the issues formed by the plaintiff's complaint for divorce, and the defendants answer thereto; and the reply of the plaintiff, and this cause is submitted and evidence is heard and this Court after hearing the argument of counsel, and the parties rest, and this Court being duly advised in the premises takes this case under advisement.
>
> And this Court, after due consideration of the matters herein now finds: That the plaintiff is a resident of the State of Indiana and of the County of Marion, as required by statute. The Court further finds that the plaintiff, Donald G. Welling, is entitled to a decree of absolute divorce from the defendant effective this date. That the defendant has been guilty of cruel and inhuman treatment towards said plaintiff, during said marriage relationship. The Court further

finds that the three children born of this marriage are now all emancipated and are married and have homes of their own. That during said marriage relationship, these parties became owners of real and personal property and the plaintiff has requested that these parties rights and interest therein be determined by this Court.

And this Court finds that the real estate owned by said parties as husband and wife, and known as Lot No. 96 in Bullman Heights Addition, and Addition to the City of Indianapolis, as recorded in Plat Book 21 page 218, in the office of the Recorder of Marion County, Indiana, also known as 235 North Basil Street, Marion County, Indiana should now become the sole and separate property of the defendant Norma A. Welling, and that the plaintiff should convey any and all interest he has therein to her, within thirty days from date. The Court further finds that all of the household goods, furnishings and fixtures in said realty should become the sole property of the defendant Norma A. Welling.

The Court further finds that all other personal property of this marriage should now become the sole and separate property of the plaintiff, Donald F. Welling.

The Court further finds that the defendant, Norma A. Welling, should receive an alimony award in the sum of Fifteen ($15) Dollars per week for a period of two years, beginning on the 4th day of August 1967, and continuing until the 4th day of August, 1969, the same to terminate at once however, in case of the death or remarriage of the defendant during said time that the plaintiff shall be responsible to pay said alimony award to the defendant, and without bond.

The Court further finds that upon the defendant's pendente lite application for attorney fees herein, that an additional sum of Six Hundred ($600) Dollars should be awarded to the defendant's attorneys Chalmer Schlosser, Jr., and Richard Adney, and that

the plaintiff should pay said fees to said attorneys within thirty days hereof.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED By this Court that the plaintiff be and hereby is granted a divorce from the defendant effective this date and the bonds of matrimony between said parties are hereby dissolved.

The Court further orders that the plaintiff convey all of his right, title and interest in these litigant's realty located in Marion County, Indiana, known as 235 North Basil Street, or Lot 96 in Bullman Heights Addition, an addition to the City of Indianapolis, the plat of which is recorded in Plat Book 21 pate 218 in the office of the Recorder of Marion County, Indiana, to the defendant, Norma A. Welling, and within thirty (30) days from date hereof; and upon his failure so to do, the Court appoints, John H. Baldwin, 901 First Federal Building, Indianapolis, Indiana to then convey said premises to said defendant, as Commissioner herein. The Court further orders that all of said household goods, furnishings and fixtures in said realty is now vested in the defendant Norma A. Welling, as her sole and separate property.

The Court further orders that all remaining personal property of said marriage is now vested in the plaintiff, Donald F. Welling, as his sole and separate property, free from any claim or interest of the defendant.

It is further ordered by the Court, that the defendant recover from the plaintiff, alimony, in installments of Fifteen Dollars per week, beginning on the 4th day of August, 1967, and continuing to the 4th day of August, 1969 however, the same shall terminate at once upon the death of the defendant or upon her remarriage.

The Court further orders the plaintiff to pay unto the attorneys for the defendant the sum of $600.00

additional fees and within thirty (30) days from date. The costs of this action are taxed against the plaintiff. Dated this 1st day of August, 1967. Charles F. Thompson, Judge."

A Motion for New Trial and Supplemental Motion for New Trial, generally contended the decision was not sustained by sufficient evidence, was contrary to law and that errors in excluding and admitting certain evidence and award and division of property constituted an abuse of discretion. Both the Motion for New Trial and Supplemental Motion for New Trial were overruled and such ruling is the sole assignment of error here.

Although there are several specifications of error, the most fundamental is the sufficiency of the evidence to support the grounds of cruel and inhuman treatment. Any misconduct by the Appellee must have occurred after August 18, 1966, and before November 30, 1966, to form the basis for this divorce action. See Hartleroad v. Hartleroad, —— Ind. App. ——, 233 N.E. 2d 250 (1968). We must construe any such evidence in favor of the Appellee. The parties were married in 1936 and their three children are all married or emancipated. The Appellant has spent her adult life as a housewife and mother and has done some baby-sitting. The parties during their marriage have accumulated certain property. The sole basis for this divorce action by Appellee is the fact that Appellant filed the non-support action against the Appellee and other defendants, on October 26, 1966, and amended it February 1, 1967. The amendment to the support action filed February 1, 1967, joined as new and additional Defendants thereto the Indiana National Bank and Metropolitan Life Insurance Company. The substance of the support action was that Appellee had deserted the Appellant without cause on August 14, 1965, and had failed to provide adequate sup-

port for her. It also alleged Appellee failed to pay certain taxes on real and personal property and to pay certain medical bills for Appellant. It also generally alleged that the other additional Defendants to the support action were in possession and control of certain property of Appellee. The Appellee's employer, General Motors Corporation, was made a party to the original support action brought by the Appellant and soon thereafter Appellee was called to the personnel office and questioned about it which he contends embarrassed him. It must be emphasized that the grounds of the Appellee for divorce are based solely on the filing of the non-support case by the Appellant and the allegations made therein and the embarrassment resulting therefrom.

Taking this evidence most favorable to the Appellee it is necessary to determine whether or not there was sufficient evidence as a matter of law of cruel and inhuman treatment. Courts have many times been confronted with the necessity of finding that evidence did or did not constitute cruel and inhuman treatment. There has developed an accepted, if not workable, definition of cruel and inhuman treatment, which definition is stated in Prouty v. Prouty, 121 Ind. App. 200, 205, 98 N.E. 2d 380 (1951), as follows:

> "The cases announce the rule that unwarranted and unjustifiable conduct on the part of the defendant which causes the other spouse to endure suffering and distress and thereby destroys peace of mind and makes living with such other spouse unbearable completely destroying the real purpose and objects of matrimony, constitutes . . . cruel and inhuman treatment."

This court has held that the standards of conduct which constitute cruel and inhuman treatment are not rigid but

elastic. Each case must be decided upon its own facts and circumstances. Waid v. Waid, 117 Ind. App. 4, 66 N.E. 2d 907 (1946); Stewart v. Stewart, 175 Ind. 412, 94 N.E. 564 (1911).

This court, and all review courts, have been, and properly so, reluctant to overrule a finding by a trial court when there is any evidence to support it. Heckman v. Heckman, 235 Ind. 472, 134 N.E. 2d 695 (1956). We reaffirm this rule. This position was stated by this court in 1962 in Shireman v. Shireman, 133 Ind. App. 699, 184 N.E. 2d 905 (1962). In that case the wife filed an application for the inquiry into the mental health of her husband under Burns Indiana Statutes Annotated, Section 22-4701, and although the application was defective on its face, a warrant was issued for his arrest and he was held in custody for two nights before securing his release by order of the Circuit Court. There was also evidence of a long series of occurrences between the parties including violent quarrels, threats and accusations. This court stated that the husband had been deprived of his liberty by a flagrant *abuse of process* and that the filing of such application was cruel and inhuman treatment. This court also laid down guidelines that have direct application to this case. At page 706 of 133 Ind. App. this court stated:

> "In the states of Maine, Nebraska, New York, Oregon and Pennsylvania it has been held or recognized that a spouse's procurement or attempted procurement of the commitment of the other spouse to a mental institution may, where made in bad faith, constitute grounds for divorce. Anno., 33 A.L.R. 2d 1234 and cases cited. If such efforts are made in good faith and in an honest endeavor to aid a spouse mistakenly believed to have been in need of such treatment, there is no ground for divorce. Anno., 33 A.L.R.

2d 1321 and cases cited. We believe this should be the law in Indiana."

Inherent in the Shireman decision is the principle that had there been no evidence of bad faith, the bringing of the commitment action would have been sufficient grounds for divorce.

Burns Indiana Statutes Annotated, Section 3-1201, lists eight causes for which, and only which, a divorce may be granted. It has been held that these are the exclusive grounds. The legal causes of divorce specified in the statute are binding on the courts and they cannot diminish nor increase them. State v. Brown, 213 Ind. 118, 11 N.E. 2d 679 (1937). Utterback v. Utterback, ——Ind. App.——, 231 N.E. 2d 827 (1967). This restriction is founded on the underlying policy that divorces are not to be granted for trivial or inconsequential reasons because of the inherent value of maintaining the martial relationship. Summers v. Summers, 179 Ind. 8, 100 N.E. 71 (1912). Haverstock v. Haverstock, 246 Ind. 425, 206 N.E. 2d 368 (1965).

Balanced against this duty to see that the statutory grounds are present is the above-mentioned reluctance of a review court to reverse a finding of the trial court where *some* evidence of cruel and inhuman treatment was presented to it and it had the physical presence of the parties before it. Heckman v. Heckman, supra.

Guided by these consideration, we find that a close examination of the evidence present and the applicable law must result in a reversal of this judgment.

There is no evidence in this record from which the trial court could have determined that the wife's action in bringing the support action was malicious or in bad faith.

To the contrary, the Appellee's own admission on cross-examination is relevant:

> "Q. So at the time of October the 26th when when you claimed you were embarrassed by this false allegation of not supporting your wife you hadn't actually supported her from January of that year at any time until October 26th, [1966] is that correct?
>
> A. That is correct."

Further, Appellee in his original complaint helps us here. He alleged that:

> "... defendant has been guilty of many and various acts of cruel and inhuman treatment towards this plaintiff, and among other things has accused him falsely of failing to provide for her ..."

Although the Appellee did not allege that these accusations were malicious or in bad faith, we are aware that the pleadings would be assumed to be amended to conform with any evidence presented of malice or bad faith. However, the important point is that no evidence of such maliciousness or bad faith was present. Further, the presence of some evidence which would justify an inference that the charge of non-support was false is not sufficient.

Without these elements of maliciousness or bad faith there could be no grounds for divorce. As noted, this court held in Shireman, supra, that the bringing of an action for a commitment to a mental institution would be grounds for divorce if such efforts were not made in good faith. The Supreme Court of Michigan has directly ruled on the question of whether or not the bringing of a *support action* was grounds for divorce and these authorities are helpful. In Beckman v. Beckman, 209 Mich. 628, 117 N.W. 143

(1920) the wife brought an action against the husband charging him with non-support. The husband sued for divorce alleging that the institution of this non-support proceeding constituted extreme cruelty. At page 146 of 177 N.W. the court stated:

> "In order to be guilty of extreme cruelty it must appear that the charges made by defendant *were not only false, but were malicious.* Statements made in good faith, *charging failure to support,* or abandonment, do not constitute extreme cruelty." (our emphasis)

The principle was followed by that court in Chase v. Chase, 332 Mich. 439, 52 N.W. 2d 177 (1952).

We believe that the bad faith requirement of *Shireman* is correct and that it should be applied, as it was by the Supreme Court of Michigan, to actions brought for non-support.

Although we do not intend to change those established principles which restrict a reviewing court's intrusion into the trial court's domain of finding facts and weighing evidence, we cannot hold that the single act of bringing a support action is cruel and inhuman treatment where there is no showing that the charge was made in bad faith or was malicious or unjustified and where there is a complete absence of any other conduct which could constitute such cruel and inhuman treatment. The Legislature of this State has enacted strict restrictions upon the granting of a divorce and these restrictions preclude us from upholding the granting of a divorce to a man who has twice failed on other grounds and attempts a third time on the basis of his obvious unilateral desire for a divorce and a lawful action for support brought by a wife.

Cause reversed there being insufficient evidence in this record of cruel and inhuman ttreatment. Costs taxed against the Appellee.

Judgment Reversed.

Hoffman, J., White, J., and Pfaff, C. J., Concur.

IN THE

APPELLATE COURT OF INDIANA

(An Appeal From The Boone Circuit Court)

Norma A. Welling,
Appellant,
v.
Donald F. Welling,
Appellee.

FILED
MAR 24 1969
Kendal E. Mathews
Clerk

No. 1267-A-110

PETITION FOR REHEARING

The Appellee, Donald F. Welling, respectfully petitions this Court to grant a rehearing in the above-entitled cause.

The Appellee, respectfully represents that this Court erred in its opinion and decision in the following respects:

1. That the opinion of this Court contravenes a ruling precedent of the Supreme Court as stated in its opinion in the following case:

> "This Court can consider only the evidence most favorable to appellee—" when question of the insufficiency of the evidence is raised on appeal.
> Anderson et al. v. Knotts (1913) 181 Ind. 434, 439.

(a) Appellee contends that this Court did not take the most favorable evidence of the appellee, as stated in the

Court's decision, when appellee's testimony on cross-examination was quoted thus:

> "Q. So at the time of October the 26th when you claim you were embarrassed by this false allegation of not supporting your wife you hadn't actually supported her from January of that year at any time until October 26th, (1966) is that correct?
>
> A. That is correct." (page 8 of decision)

The above quotation was found on pages 138 and 139 of the Transcript or Record, and was at the close of the cross-examination. The preceeding evidence in the record shows that the witness thought the question was directed to *payments of money* during this calendar period from January 1966 to October, 1966. The favorable evidence clarifying this excerpt of testimony of this witness; and repudiating it; was as follows:

DIRECT TESTIMONY OF DONALD F. WELLING:

> "Q. Now you've alleged in your complaint that since October of 1966 the defendant has been guilty of many and various acts of curel and inhuman treatment towards this plaintiff and among other things has accused him falsely by failing to provide for her, did the defendant any antime after October, 1966 accuse you of failing to provide?
>
> A. Yes.
>
> Q. And when was this?
>
> A. On October the 26th, 1966.
>
> Q. And what if anything was done or said at that time?
>
> A. She accused me of, of failing to furnish support

on, or refusing and failing to pay support or make any provision for support.

Q. Alright and was that accusation false?

A. Yes it was false. (Tr. 91, L. 10-28)

(Mr. Baldwin, reading paragraph No. 2 of the appellant's complaint filed on October 26, 1966) "Paragraph 2 of the complaint filed on October 26th 'that on or about the 14th day of August, 1965, said Donald F. Welling deserted the plaintiff without cause and without making adequate provisions for her support, *that thereafter* said Donald F. Welling, has *refused and failed to pay support* support to this plaintiff *or make any provisions for the support of this plaintiff.*"

Q. Now you state that is false is that correct?

A. Yes.

Q. And did you make any provisions for your wife's support?

A. Yes.

Q. And what provisions were made at the time that (Tr. 107, L. 15-28) that was filed on October the 26th, 1966)

Q. Did you make provisions for her support between the time you left her until the time she made this false accusation?

A. Yes.

Q. Alright what did you provide her with? (Tr. 110, L. 22-28)

A. She had a house that furnished like it is would surely rent for a hundred dollars a month and

that was fourteen months, that would be fourteen hundred dollars.

Q. Well, did you provide her with any money?

A. And I provided her with three hundred dollars from December the 19th, 1965, to January 17, 1966.

Q. Alright did you provide her with any other money?

A. No not that—

Q. Did you, did she take the joint bank account of— (Tr. 111, L. 1-8)

Q. Alright, now tell the Court how much she had from the period between August the 14th, 1965, until October 26th when she filed this accusation in 1966?

A. *She had $3640.85.* (Tr. 111, L. 15)

Q. Now what is the value of this house, Mr. Welling?

A. $10,000.00 (Tr. 114, L. 1-3)

Q. *Was the house and the automobiles and the bank account both or was that all as a result of your earnings, that you earned at Allison's engineerings?* (Tr. 114, L. 24)

A. Yes. (Tr. 114, l. 1-3 and L 24-48)

Q. Did your wife ever work during your married life?

A. No. (Tr. 115, L. 1-3)

Q. All this property represents all your efforts in the marriage?

A. That's right. (Tr. 123, L. 13-15)

CROSS EXAMINATION OF MR. WELLING

Q. And you didn't leave her any money to live on?

A. That's right I told her I didn't have any—

Q. (Intervening) Now just answer my question, you didn't leave her any money to live on is that right?

A. That's right.

Q. You made no provisions for any regular payment of support or anything to live on for her, right?

A. I went to the bank the next morning to make provisions and I found out that *she had taken all the monies from* the bank. (Tr. 126, L. 14-18)

Q. Now the money she received for support during this first divorce case came out of your joint savings account which she had placed in her name is the correct?

A. No, the monies that I had put in there out of a joint (Tr. 126, L. 24-28) savings account.

Q. It all came out of the savings?

A. That I earned, that's right.

Q. And the Court authorized her to use this?

A. *Yes, at seventy-five dollars a week, which should have lasted actually thirty or twenty-five weeks* and in thirteen weeks there was a second hearing so she should have some of it left even. (Tr. 127, L. 5-12)

Q. How much support did you pay from January to the date of trial in June of '66'

A. You mean what the Court ordered me to pay for that?

Q. No, how much did you pay in money or value?

A. What the Court ordered me to pay, that's the question your'e asking?

Q. No. how much money *did you pay* from the time your quit in January of '66 until the day of the trial in June '66?

A. Nothing.

Q. Nothing, now—

A. (Intervening) But I did have the check for each week.

Q. And you kept them?

A. Yes Sir, later most of it was turned back to her. (Tr. 129, L. 13-28)

Q. When did you begin paying support was the question?

A. *I began paying support the way I figure it back as soon as I left home when she started getting seventy-five dollars a week.* (Tr. 133, L. 14-17)

REDIRECT EXAMINATION OF MR. WELLING

Q. You had provided her with a house all this time purchased with your monies?

A. *That's right.*

Q. And you had provided her with all the savings account money that she withdrew on October 16, 1965, in the amount of two thousand dollars did you not?

A. *That's right* and I made the statement that that should have lasted twenty-five weeks and it only, and in thirteen weeks there was another hearing

and they ordered me to pay fifty dollars a week which there should have been some of that left even at seventy-five dollars a week.

Q. And she was in possession of all, approximately all the worldly goods you possessed?

A. *That's right.*

Q. She had taken possession of them from August '65 until the present time isn't that correct?

A. *That's correct.* (Tr. 139, L. 5-23)

Q. Has it, has that eight hundred and ten got anything to do, did you include it in your figures?

A. No Sir.

Q. Alright then, the eight hundred and ten dollars that they're talking about that was paid after this action was filed prior to that time you had paid her in value and in monies that you had earned three—

A. (Intervening) *Three thousand six hundred and forty dollars and eighty-five cents.*

Q. And had no connection at all with the eight hundred and ten dollars:

A. *That's right.*

Q. And it was then that she made the charge? A. *That's right.*

Q. And accused you falsely that you had never provided support for her or made provisions for her after August (Tr. 141, L. 13-28) the 14th, 1965? A. *Yeah, and that was*

Q. (Continuing) *approximately 14 months, and that would figure out about two hundred and sixty*

dollars a month that she got during that time." (Tr. 142, L. 1-4)

The Appellee contends, that the Appellate Court's decision contravened said ruling precedent, in that the most favorable evidence in the trial, showed that the Appellee provided his wife with support from August 14th, 1965, to October 26th, 1966, at the rate of $260 a month; that said Court erred in holding that he had not provided her with support during said period.

PART "B"

The Appellee further states, as Part "B" of No. 1 supra that the Appellate Court erred in its decision, when the Court stated in its opinion:

"The substance of the support action was that Appellee had deserted the Appellant without cause on August 14, 1965, *and had failed to provide adequate support support for her."* (Page 5 of decision)

The Appellee contends that this is not his most favorable evidence in the case. That the issue in the case was stated correctly in the complaint for divorce, towit:

"4. That since October, 1966, said defendant has been guilty of many and various acts of cruel and inhuman treatment towards this plaintiff, and among other things, has accused him falsely *of failing to provide for her; has attempted to interfere with his employment by making said false accusation to plaintiff's employer; has attempted to make said employer a party defendant to their marital strife;* all of which acts have caused this plaintiff great mental anguish and created a permanent barrier between said litigants, from which no reconcilation is possible." (Tr. 4)

The appellee finds no issue or eyidence wherein "adequate support" was injected into the record of this cause.

That the favorable evidence to the Appellee in the case was his testimony, viz:

"She accused me of, of failing to furnish support on, or refusing and failing to pay support or make any provision for support.

Q. Alright and was that accusation false?

A. Yes it was false."

Q. Now was this in the form of a formal complaint filed in the Marion Superior Court, Courtroom No. 6, known as S66-979? (Tr. 92, L. 21-28)

A. *That's right.* (Tr. 93, L. 1)

(Here Appellee's counsel introduces into evidence Plaintiff's Exhibit NO. 1 (Tr. 94-106) which is a certified copy of Appellant's Complaint filed 260ct66 (Tr. 104) and the Amended Complaining filed 1Feb67(Tr. 96) plus other papers shown on Tr. 94)

Counsel then reads into evidence:

"Paragraph 2 of the complaint (and Amended Complaint) stated; "—that on or about the 14th day of August, 1965, said Donald F. Welling deserted the plaintiff without cause and without making adequate provisions for her support, *that thereafter said Donald F. Welling has refused and failed to pay support to this plaintiff or make any provisions for the support of this* plaintiff."

Q. Now you say that is false is that correct?

A. Yes.

Q. And did you make any provisions for your wife's support?

A. Yes. (Tr. 107, L. 15-27)

The appellee contends that the most favorable evidence for him in said cause and the correct statement as to the substance of this action, was The false accusations made by the Appellant in her complaint of October 26, 1966; and repeated again on February 1, 1967, in her Amended Complaint; that the Appellee, from August 14th, 1965, to the dates of filing of said complaint and Amended Complaint, *had failed, and refused* to pay support *or make and provisions for her support.*

Therefore, the Appellate Court contravened the above ruling precedent of the Supreme Court, in that said Appellate Court did not consider the most favorable evidence in the case in favor of this Appellee.

PART "C"

The Appellee further states, as Part "C" of No. 1, supra that the Appellate Court erred in its decision, when the Court stated in its opinion and decision, that:

> "There is no evidence in this record from which the trial court could have determined that the wife's action in bringing the support action was malicious or in bad faith." (Page 8 of decision)

as such holding contravened the most favorable evidence and inference therefrom in favor of the Appellee; which, according to said precedent, the Appellate Court, must consider, towit:

1. The evidence showed that during this period from August 14th, 1965 to October 26th, 1966, she had received

support from the Appellee at the rate of $260 a month (testimony of Mr. Welling Part "A" page 4, supra) (Tr. 142, L. 1-4).

The record also shows that Appellant never attempted to justify her false accusation of non-support for the period of time from August 14th, 1965 to January 16th, 1966. In stead, the Appellant relied upon the period of time from January 16, 1966, to October 26, 1966, (Her testimony Tr. 168-180). Therefore, the evidence most favorable to Appellee, showed that this part of her false accusation; was false indeed.

Instead, she relied upon the nine months during January to October, 1966, to support her accusation, viz:

DIRECT EXAMINATION OF NORMA WELLING

"Q. Now this lawsuit was for support was filed on October 26th, 1966, of, on that date *had you received any support from the plaintiff for the previous nine months?*

A. No.

Q. Had anyone in the plaintiff's behalf paid you any money or offered you any money or support during this period?

A. No sir." (Tr. 171, L. 4-12)

The above statement by this witness was not only false but contrary to the decision of the Johnson Circuit Court, given on August 18, 1966, which stated:

"The Court further finds that the plaintiff was in arrears on support heretofore ordered *but that deft has spent certain monies of the plff's for her living expenses which should be deducted* (Tr. 168) *from amount in arrears* and that at time of trial plff owed the net sum of $810.00 on back support after the above

deduction and plff is ordered bo pay said sum within thirty days from date.—" (Tr. 168)

In this second divorce action, which began November 12, 1965, (Tr. 160) the Court ordered Appellee to pay the pendente lite sum of $50 a week Beginning December 10, 1965, which Appellee paid until January 17th, 1966, when Appellant filed a demurrer claiming he had no cause of action. (Tr. 128, L. 11-27). The record shows that her false accusation that he had failed and refused to pay her support and to provide for her support, from August 14th, 1965 to October 26th, 1966; was untrue. And taking the evidence most favorable to the Appellee, shows that the Court found that he had provided her with support during this nine months period. This favorable evidence further showed that she knew her accusations were false when she made them on October 26th, 1966; and when she repeated the same false accusations in her Amended Complaint, filed February 1, 1967, (Tr. 96-97). The record shows, that when she amended her complaint for non-support and in addition to making his employer a party defendant; also included his bank and his insurance company, asking for judgment against each of them in the sum of $20,000; (Tr. 96-98) she had received the $810 payment of support; plus $50 a week from December 20, 1966, (Tr. 18, L 6-9) from the third divorce action.

Further, the Appellee, attacked said false accusation in his Motion To Strike, filed December 5, 1966, (Tr. 100) pointing out the falsity of said statements; and that she had received the sum of $240 a month since August 14, 1965 (Tr. 101, L. 11-13); yet the evidence shows that she did not correct said statements after said Motion had been filed; or give him any credit for any support made at

any time; and proceeded to make such false accusations to his bank and insurance company.

The Appellee vigorously contends that the above favorable evidence and the inference arising therefrom, should have been considered by the Appellate Court; as showing malice and bad faith on the part of the Appellant in making said false accusations against him; and failure to do so, contravened a ruling precedent of the Supreme Court, as stated in Point No. 1, page 1, supra.

POINT "D"

The Appellee would further state, under this point, that her said accusation that he had failed and refused to pay support was shown to be false; and known to her to be false; because the favorable evidence to Appellee, proves that the Johnson Circuit Court, in its decision of August 18, 1966, did not find him in contempt of Court, for withholding the support payments, towit:

> "Please be advised that in the above cause the Court being duly advised now finds for the deft and that plff is not entitled to a divorce from the deft. The Court further finds that plff was in arrears on support heretofore ordered but that deft has spend certain monies of the plff's for her expenses which should be deducted (Tr. 167) from amount in arrears and that at time of trial plff owed the net sum of $810 on back support after the above deduction and pff is ordered to pay said sum within 30 days from date. The Court further finds that plff shall pay the sum of $425 as a final fee for dft's attys in addition to the sums heretofore paid thereon. Judgment ordered. Costs taxed to plff." (Tr. 168, L. 1-5)

The favorable evidence to Appellee, shows that she raised the issue of refusal to pay support in her contempt

citation, which issue was adjudicated by the Johnson Circuit Court in the above judgment. This issue was raised in her answer in said cause Filed June 17, 1966, towit:

> "1. That in the above entitled action the Court on December 10, 1965, entered an order requiring the plaintiff to pay to the defendant the sum of $50 per week for her use and benefit during the pendency of the present action.
>
> 2. That plaintiff has failed and refused to pay any of said support order for the period beginning January 21, 1966, to the present date.
>
> 3. That this defendant has heretofore on February 15, 1966, filed her affidavit showing said refusal to comply with the order of this Court and that said matter is now (Tr. 166) pending before this Court." (Tr. 167, L. 1)

The above judgment shows that the Court did not find him in contempt for refusing to pay support. The evidence further shows that she knew this issue had been adjudicated by the Court when she made the false charge in October, 1966. That the inference arises in favor of the Appellee, that she made said charges in malice and bad faith. That this evidence and the inference arising therefrom should have been considered by the Appellate Court; and failure to do so contravened a ruling precedent of the Supreme Court at stated on page No. 1 hereof.

POINT "E"

The Appellee would further show that the evidence favorable to him shows malice and bad faith on her part when she made the false accusation; in that she claimed the Court ordered the entire $2,000 savings account used for her support, viz:

CROSS EXAMINATION OF NORMA WELLING:

"Q. And you heard your husband's testimony that he paid you up until January, 1966, January 17th, 1966, he paid you everything the Court ordered is that correct?

A. Yes, I guess it is.

Q. Alright then you took the bank account I think you stated, is that correct?

A. *Well, that was what the Court ordered him to pay me was what was in the account.*" (Tr. 176, L. 17-25)

The record shows that the first divorce action was filed in August 16, 1965, and terminated on November 4, 1965, (Tr. 150, L. 2-7) when the jurisdiction of the Court terminated with the judgment of November 4, 1965, when both the complaint for divorce and the cross-complaint for Limited Divorce was denied. The evidence most favorable to this appellee shows that said order terminated with said judgment and there was no order to exhaust this $2,000 savings account as she above stated.

Further, the most favorable evidence for Appellee showing malice and bad faith on her part, would be, that if her statement was true; then she was receiving support from him for from the time they separated in August, 1965, through March, 1966, counting the $360 he paid from December 12, 1965 to January 21, 1966, (Tr. 111, L. 4-5).

The Appellee contends that the Appellate Court erred in holding that there was no evidence whatever, showing that her action in bringing said non-support action was malicious or in bad faith. The evidence most favorable to Appellee showed that she knew her statements were false, when she accused him of failing and refusing to pay sup-

port or to provide for her support from August 14th, 1965 to October 26, 1966. That failure to consider this evidence contravened the precedent of the Supreme Court, stated on Page 1, supra.

POINT "F"

The Appellee, would show under this point, that the decision of the Appellate Court, holding that there was no evidence in the record from which the trial court could have determined that her action in bringing the support action was malicious or in bad faith; was in error, as the Court failed to consider the favorable evidence to the Appellee in the following respect:

PLAINTIFF'S EXHIBIT NO. 1

(Excerpts from her Amended Complaint)

"2. That on or about the 14th day of August, 1965, said Donald F. Welling deserted plaintiff without cause and without *making adequate provisions* for her support.

3. *That thereafter,* said Donald F. Welling has *refused and failed to pay support* to this plaintiff *or to (Tr. 96) make any provisions for the support of this plaintiff.*

4. That in addition to said failure of said Donald F. Welling to provide for the support of plaintiff, said defendant *has refused and failed to pay the taxes* due and payable in May, 1966, upon the real and personal property in the total amount of $149.45, *and to pay outstanding bills for necessary medical service for this plaintiff.*

5. That defendant General Motors Corporation, is possessed of *certain money, corporate stock* and *other property* belonging to said Donald F. Welling, towit:

(1) 12 shares of common capital stock of General Motors Corporation.

(2) A *deposit of money* held by said General Motors Corporation for the purchase of *Series "E" Bonds.*

(3) *Wages* which from time to time said General Motors Corporation from time to time, owes said defendant, Donald F. Welling, in the amount of approximately *$250.00 each week.*

6. That defendant, Indiana National Bank of Indianapolis, as trustee, has in its possession and control *certain monies* belonging to the defendant Donald F. Welling, for use by said trustee in the purchase of stock in General Motor Corporation for the use and benefit of said Donald F. Welling.

7. That defendant, Metropolitan Life Insurance Company has in its exclusive possession and control *certain monies* belonging to defendant Donald F. Welling held (Tr. 97) by said Insurance Company as *a part of a retirement program* said company administers for General Motor Employee and for defendant Donald F. Welling.

That this Court should order said property above described or so much thereof as is equitable be *sold* and otherwise *converted into cash* and said sums *be paid to this plaintiff* as and for her support.

WHEREFORE, Plaintiff prays that said personal property of said Donald F. Welling now held by said defendants be sold to the highest bidder for cash and upon such other terms as the Court may direct; that the Court make and enter an order against each of said defendants requiring them to pay over unto plaintiff out of the funds now held by them for the use of Donald F. Welling, as reasonable sum for her support and that said order be a first charge against any and

all assets of said Donald F. Welling now in the hands of each of said defendants or which may come into their possession; *that plaintiff be granted judgment against each defendant in the amount of $20,000.00* and for all other just and proper relief." (Tr. 98, L. 1-20)

That the favorable evidence and inferences to be drawn therefrom are:

1. Could there be a desertion when there was only 7 days intervened from August 1965 to October, 1966, when these parties were not in Court? (Tr. 4; 150; 160)

2. How could she justify such statements about failing to pay taxes and her medical bills, when he paid the $810 which the Court had ordered for her support? (Tr. 130, L. 28)

3. Why did she make these charges at all when all that was necessary, was to allege he had failed to provide her with adequate support?

4. Why did she join his employer and endanger his job, when a Court order against him would suffice?

5. Why did she join the Bank and the Insurance Company and ask for $20,000 judgment against each of them, when she was seeking only adequate support?

6. Why did she seek to sell and divide his stock and retirement fund, if she was seeking only support?

7. Why did she seek to defame his character when such allegations were unnecessary in said action?

The appellee contends that the Appellate Court erred in not considering such favorable evidence and the inferences arising therefrom, and such failure was incontra-

vention of the Supreme Court precedent set forth on Page 1 hereof. (Note: the falsity of her statements in paragraph 3 above, has already been shown in Points "A" and "C" above.)

II

That the opinion of the Appellate Court in holding that "There is no evidence in this record from which the trial Court could have determined that the wife's action in bringing the support action was malicious or in bad faith." was in error and contravened a ruling precedent of the Supreme Court in its opinion in the following cases:

> "The evidence is sufficient on appeal if the inferences from the evidence are sufficient to support the judgment. It is not essential that the facts be established by positive evidence. It is sufficient that the evidence *supplies reasonable grounds for inferring facts essential to recovery.*"
>
> Armstrong et al. v. Oster, et al. (1919) 189 Ind. 1, 6, 7.

> "The rule by which this Court is governed in passing on a motion for a new trial because of the alleged insufficiency of the evidence *is to accept as true all evidence and all inferences from the finding, if any there be, and to reject and disregard all evidence to the contrary.*"
>
> Brier v. Childers, Admr. et al. (1925) 196 Ind. 520, 528.

The appellee states that the evidence in this cause, as heretofore stated in this petition for rehearing, under Points "C"; "D" and "E" show that the evidence and the inferences arising therefrom; show that the staements by the Appellant in the non-support action of October 26,

1966; and subsequently amended on February 1, 1967, were false and made in bad faith. That she was attempting to degrade him in the eyes of his employer, his bank and his insurance company, according to the inferences drawn from said evidence; and that such degradation was wholly unnecessary to support and/or bring said action. Further, the evidence and inferences therefrom, showed malice and bad faith, when she amended her action on February 1, 1967, and failed to correct such misstatement, after they were pointed out to the Appellant by Appellee's Motion To Strike. Nor did she give Appellee credit for any support payments that he had made during the period of August, 1965 to October, 1966; nor acknowledge that she had taken the $2000 bank account.

Also, the Appellate Court should have found from the favorable evidence and inferences arising therefrom, that the substance of this action; was not the bringing of the action for non-support; but the false and malicious statements made by the Appellant, in said action, as heretofore pointed out and in the following evidence, towit:

DIRECT TESTIMONY OF DONALD F. WELLING

"Q. Now you've alleged in your complaint that since October of 1966, the defendant has been guilty of many and various acts of cruel and inhuman treatment towards this plaintiff and among other things has accused him falsely by failing to provide for her, did the defendant falsely accuse you of failing to provide?

A. Yes.

Q. When was this?

A. On October the 26th, 1966.

Q. And what if anything was said or done at that time?

A. She accused me of, of failing to furnish support or make any provision for support.

Q. Alright and was that accusation false?

A. Yes it was false.

Q. Now was this in the form of a formal complaint filed in the Marion Superior Court, Courtroom No. 6, known as S66-979? (Tr. 92)

A. That's right.

(The Complaint, the Summons, the Amended Complaint and Summons are introduced into evidence as Plaintiff's Exhibit 1, showing the employer, the bank and the insurance company were brought in as defendants) (Tr. 92-116)

Q. Alright, now tell the Court how much she had from the period between August the 14th, 1965 until October 26th when she filed this accusation in 1966.

A. She had $3640.85 (Tr. 111)

Q. Now did this cause you any embarrassment in your relation?

A. It sure did I was called to personnel and questioned to what I did, to what, how much monies I had and what, how much support I paid, she said I hand't paid any and they questioned me as to how much I had paid and what I had paid, the question as to what I had in assets in stock and bonds and then my retirement fund and it came all the way back to my immediate supervisors so I was very much embarrassed." (Tr. 115)

That the above evidence was sufficient to sustain the judgment of the Court below.

III

That the opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court as stated in the opinions in the following cases:

> "It is well established that this Court will not *weigh the evidence* and *substitute its judgment for that of the trial court* and where there is any substantial evidence of probative value to sustain the decision of the trial court it will be sustained."
>
> Echtering Et. Ux. v. Kalvaitis, Et. Ux. (1955) 235 E Ind. 141, p. 147.

> "The trial court heard the evidence and was in a position to weigh it and decide what it would or would not believe. *This Court will not undertake to weight the evidence upon appeal.*"
>
> City of Huntington et al. v. Northern Indiana Power Co. (1937) 211 Ind. 502, 519.

In this case, the Appellate Court proceeded to weigh the evidence of the Appellee, towit:

> "Q. So at the time of October the 26th when when you claimed you were embarrassed by this false allegation of not supporting your wife you hadn't actually supported her from January of that year at any time until October 26th, (1966) is that correct?
>
> A. That is correct." (Page 8 of decision)

as against his other statements in the record, that he had supported his wife during this period, towit:

> "A. She has $3640.85 (Tr. 111, L. 15)

Q. And accused you falsely that you had never provided support for her or made provisions for her after August (Tr. 141) 14th, 1965.

A. Yeah, and that was approximately 14 months and that would figure out about two hundred and sixty dollars a month that she got during that time." (Tr. 142, L. 1-5)

thus the Appellate Court substituted its judgment for that of the trial court; plus that of the Johnson Circuit Court, who found that he had been paying some support during the nine months period she claimed nothing was paid.

IV

The the opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court as stated in the opinions in the following cases:

> "The credibility of the witnesses, and the weight to be given to oral testimony is ordinarily to be determined by the trier of the facts."
>
> McKee v. Mutual Life Insurance Company of New York. (1943) 222 Ind10, 15.
>
> The jury or trier of the facts is "—the exclusive judge of the credibility of the witnesses and the weight to which their testimony is entitled."
>
> Lynch v. Bates Et al. (1894) 159 Ind. 206, 211.

for the reason that the Appellate Court, attempted from the record, to try this case and weigh the evidence and determine the credibility of the witnesses and the weight to be given their testimony. That in so doing the Court failed to observe the Appellant, and the evidence she gave to the Court below. That she stated under oath, just three days after she had removed their $2000 bank ac-

court, that she had no money to support herself during the pendency of the first action (Tr. 156, 157) that she never admitted the existence of said money in her direct examination (Tr. 168-173) and fought to keep it out of the Cross-examination (Tr. 173) and testified that she had received no support from the Appellee during the nine months period from January to October, 1966, when she knew that said statements were false, as the Johnson County Circuit Court had found that he had paid some support to her during this period as pointed out in Point "C" supra; and falsely accused the Appellee of failing and refusing to pay support; when this issue was not found by the Johnson Circuit Court, as pointed out under Point "D" supra.; that she further testified that the Court ordered him to pay her support until said bank account was exhausted, which statement was not true as shown in Point No. "E" supra.

Therefore, the Appellate Court erred in holding:

> "Although the Appellee did not allege that these accusations were malicious or in bad faith, we are aware that the pleadings would be assumed to be amended to conform with any evidence presented of malice or bad faith. *However, the important point is that no evidence of such maliciousness or bad faith was present.*" (Page 8 of decision)

and the Appellate Court held that all of the evidence and the inferences to be derived therefrom was insufficient to sustain the judgment of the Court below. Such decision is contrary to the Supreme Court precedents set forth above.

IV

That the Appellate Court in their opinion decided a new question of law, when they held:

> "Further, the presence of some evidence which would justify an inference that the charge of non-support was false, is not sufficient." (Page 8 of decision)

which appears to be in error by this Appellee, as the Supreme Court has held:

> Brier case cited on page 13 of this petition in incorporated here by reference.
> "The trial could have inferred that her actions were not in good faith.
>
> Shireman v. Shireman (1962) 133 Ind. App. 699, 707
>
> "—malice may be inferred by the jury from the want of probable cause."
>
> Heap v. Parrish (1885) 104 Ind. 36, 38.

VI

That said Appellate Court's failure to follow the above precedents of the Supreme Court denied this Appellee the equal protection of the law and due process of law in the review of this case on appeal.

/s/ John H. Baldwin
Attorney For Appellee.

A-43

IN THE

SUPREME COURT OF INDIANA

Norma A. Welling, *Appellant,* v. Donald F. Welling, *Appellee.*	No. 1267-A-110 FILED APR 23 1969 Kendal E. Mathews Clerk of the Indiana Supreme and Appellate Courts

APPELLEE'S PETITION TO TRANSFER

The appellee, in the above entitled cause respectfully shows to the Court that:

1. That the judgment in this action in favor of this appellee by the Boone Circuit Court was reversed by the Indiana Appellate Court, Second Division, on the 5th day of March, 1969, with a written opinion filed on said date.

2. That the decision of the Appellate Court was against this Appellee.

3. That this petitioner filed his application for a rehearing with the Clerk of this Court on the 24th day of March, 1969 which date was within 20 days from the rendition of said decision.

4. That said petition for rehearing was denied by said Appellate Court on the 3rd day of April, 1969, which date is within 20 days before the time for filing this petition expires.

5. That this Court has jurisdiction of this petition by virtue of Rule 2-23 of the Indiana Supreme Court.

6. That the opinion of the Appellate Court:

(a) contravenes a ruling precedent of the Supreme Court, being, that when the question of insufficiency of the evidence is raised on appeal, the reviewing Court "—can consider only the evidence most favorable to the appellee—".

Anderson et al. v. Knotts (1913) 181 Ind. 434, 439.

This precedent was not followed by the Appellate Court in this case as the Court failed to consider the most favorable to the Appellee in the trial Court, nor the favorable inferences arising therefrom, which showed that this Appellee had supported his wife in the amount of $260 a month since the time of separation; and that her accusation to the contrary, was false. That she made said false accusation deliberately to his employer, his bank and his insurance company and joined them as defendants in her action. That such action constituted cruel and inhuman treatment and was sufficient grounds for the trial Court to award a divorce to this Appellee. That said Appellate Court erred in holding there was no evidence in the record to support the decision of the lower Court.

(b) contravenes a ruling precedent of the Supreme Court, being, that the reviewing Court will accept as true, all evidence and inferences therefrom in favor of the Court's finding; and disregard and reject all evidence to the contrary.

Brier v. Childers, Admr. et al. (1925) 196 Ind. 520, 528

This precedent was not followed by said Appellate Court in this case, as stated in (a) supra.

(c) contravenes a ruling precedent of the Supreme Court, being "—the evidence is sufficient in appeal if the inferences from the evidence are sufficient to support the judgment.

Armstrong et al. v. Oster et al. (1919) 189 Ind. 1, 6, 7.

This precedent was not followed by the said Appellate Court in this case as the Court did not consider the favorable inferences from the evidence in favor of the Appellee, as stated in (a) supra. In fact, said Appellate Court erred in stating: "Further, the presence of some evidence which would justify an inference that the charge of non-support was false, is not sufficient."

(d) contravenes a ruling precedent of the Supreme Court, being, that the trial Court determines the credibility of the witness and the weight to be given to their testimony.

McKee v. Mutual Life Insurance Company of New York. (1943) 222 Ind. 10, 15.

The Appellate Court erred in weighing the testimony of the Appellee, in taking one statement he made wherein he said he had not supported or paid support to her from January to October. That it was shown that the witness thought this question pertained to payments of money. That his other statement was, as regards to providing her with support, he had paid her $260 a month during said time. The Appellate Court proceeded to weigh this one statement as against the other, the latter being more beneficial to the Appellee. The Court ignored the fact that she had taken all his life savings out of the Bank, which

amounted to support, whether he was making payments or not.

Wherefore, appellee respectfully petitions this Court to transfer this case to the Supreme Court and to set aside and annul said erroneous judgment of the Appellate Court and for any and all other relief.

/s/ John H. Baldwin
Attorney for Appellee.

THE PERTINENT REFERENCES TO THE RECORD

1. The complaint for the third divorce was filed in Marion Superior Court No. 7 on November 30, 1966. He alleges he has resided in Marion County for past 20 years; they were married October 19, 1936 and separated August 14, 1965 and have not cohabited since. Three children were born, two are adults and third is in college and is 19 years of age.

"That since October, 1966, said defendant has been guilty of many and various acts of cruel and inhuman treatment towards this plaintiff, and among other things, has accused him falsely of failing to provide for her; has attempted to interfere with his employment by making said false accusations to plaintiff's employer; has attempted to make said employer a party defendant to their marital strife; all of which acts have caused this plaintiff great mental anguish and created a permanent barrier between said litigants, from which no reconciliation is possible." (Record 4) He prays for a division of their property and a divorce.

2. She files for support and attorney fees pendente lite. on December 7, 1966. (R.-9)

3. On February 6, 1967, she files Answer in denial of the above charges and in Paragraph II she sets out the other two divorces with copies of transcript of the pleadings and judgment of each, marked Exhibits A.B.C. That since the judgment of the second divorce denial on August 18, 1966, he has without cause refused to live with her. The exhibits show the first case filed in Marion Circuit Court, the complaint and answer thereto; the Cross-complaint wherein she asks for a separation for five years and a restraining order. He replied claiming any habitual cruelty was justified and provoked. (R. 25-35) The judgment denying the divorce to him and denying the Cross-complaint to her on Nov. 4, 1965 appears on R-39.

He files his second action for divorce in the Marion County Superior Court Room 5 on November 12, 1965 (R. 36) Amended Dec. 10, 1965. He alleges when they separated, she secretly withdrew all their monies and placed it in a place unknown to him and failed to give him his half share or tell him where it is since the first divorce was denied. (R-39) She files an answer in denial and sets up he has not paid her support since January 21, 1966. This was filed on day of trial on June 17, 1966.

On August 18, 1966 the Johnson County Court enters decision denying divorce

> "—now finds for the deft and that plff is not entitled to a divorce from the deft. The court further finds that plff was in arrears on support heretofore ordered but that deft has spent certain monies of the plff's for her living expenses which should be deducted from amount in arrears and that at time of trial plff owed the net sum of $810.00 on back support after the above deduction and plff is ordered to pay said sum within 30 days from date. The court further finds that plff

shall pay the sum of $425.00 on a final fee for dfts' attys in addition to the sums heretofore paid thereon. Judgment ordered. Costs taxed to plff." (R.-44)

4. On February 6, 1967, she filed Motion to venue case from Marion County and case goes to Boone County, Indiana. (R-45)

5. On March 31, 1967, he files Reply alleging res judicata and estoppel to the former actions. (R-55)

6. On June 9, 1967, Cause is submitted to Court for trial. (R-62) The two resident witnesses testify as to his residence. (R87-90) Donald F. Welling, testifies on Direct Examination: (Material parts) He testified she had made false accusations that he had failed to support her; refused to support her or make any provisions for her support. These accusations were in the form of a complaint filed in Marion Superior Court Room No. 6, Cause S66-979. (R-92) He identifies the transcript of the proceeding in that Court as Plaintiff's Exhibit No. 1 which is read in evidence. The complaint is filed by her on October 26, 1966, joining him and his employer General Motors Corporation as defendants. (R-104) She alleges, he deserted her on August 14, 1965 and thereafter he "—has refused and failed to pay support to this plaintiff or to make any provision for support of this plaintiff." (R-104, 105) she asks that his stock, wages and deposits of money be sold to the highest bidder for cash and she be granted judgment for $20,000. (R-106) General Motors appear by their attorneys. (R-102) On Dec. 5, 1967 he filed Motion To Strike the complaint as a sham plea, as she has the bank accounts, of $2,000; support from him in the sum of $1,100 and it averages $240 a month since he left; plus she has received $500 attorneys fees. (R-101) On February 1, 1967

she amends her complaint and joins the Indiana National Bank and the Metropolitan Life Insurance Co. as additional defendants (R.-96) and again repeats the same charges "That on or about the 14th day of August, 1965, said Donald F. Welling deserted plaintiff without cause and without making adequate provisions for her support.

3. *That thereafter, said Donald F. Welling has refused and failed to pay support to this plaintiff or to make any provisions for support of this plaintiff.*" (R-96, 97)

He stated that since August 14, 1965 he had furnished her with a house that was furnished that would rent for $100 a month. Plus support money from Dec. 19th 1965 to Jan. 17, 1966 in the amount of $300, the $1,900 she took from the bank account; and that from August 14, 1965 to October 26, 1966, when she filed this false accusation she had $3,640.85 (R-111) That the house, the automobiles and bank account was all the result of his earnings at Allison's Engineering. (R-114) She never worked. Joining the other defendants caused embarrassment for him. He stated: "It sure did I was called to personnel and questioned to what I did, to what, how much monies I had and what, how much support I paid, she said I hadn't paid any and they questioned me as to how much I had paid and what I had paid, the question as to what I had in assets in stock and bonds and then my retirement fund and it came all the way back to my immediate supervisors so I was very much embarassed." (R-115) He stated no reconciliation with his wife was possible. (R-116)

On Cross-Examination he stated: That when he left his wife he didn't have any money, it was Sunday, he went to the bank the next morning to make provisions for her support and found she had taken all the monies from the bank. When the second divorce action was filed he be-

gan paying her support at $50 a week from Dec. 10, 1965 to Jan. 17, 1966, he quit when they filed a demurrer (R-128) You filed a demurrer stating I had no cause of action. He stated he had not paid her anything from January, 1966 to the date of trial in June, 1966; but he did have the checks each week. That most of them were turned back to her (R-139) that the $810 was not current support but delinquent support from the last lawsuit. I paid support from the time I left home when she started getting $75 a week. (R-133) I sent her $5.00 a week until the third divorce action was filed. (R. 134) I paid $60 a week from then on. I didn't pay the $810 then as we had asked for a rehearing.

Q. So at the time of October the 26th when you claimed you were embarassed by this false allegation of not supporting your wife you hadn't actually supported her from January of that year at anytime until (R. 138) October 26th, is that correct?

A. That's correct. (R. 139, Lines 1 and 2)

REDIRECT EXAMINATION;

Q. You had provided her with a house all this time purchased with your monies had you not?

A. That's right.

Q. And you had provided her with all the savings account money that she withdrew on October 16, 1965, in the sum of two thousand dollars did you not?

A. That's right and I made the statement that that should have lasted twenty-five weeks and it only, and in thirteen weeks there was another hearing and they ordered me to pay fifty dollars a week which there should have been some of that left even at seventy-five dollars a week.

Q. And she was in possession of all, approximately all the worldly goods you possessed?

A. That's right.

Q. She had taken possession of them from August '65 until the present time isn't that correct?

A. That's correct.

Q. And regards to this eight hundred and ten dollars payment wasn't it a fact that after the judgment was entered in August the 18th, 1966, that we filed a motion for a new trial in the Johnson Circuit Court?

A. That's right, that's what I tried to explain to him (R- 139, Lines 3-28)

Q. And didn't we file and ask to receive a transcript of the complete record for purposes of appeal?

A. That's right.

Q. What happened if anything to the motion for new trial.

A. The Court apparently forgot to file it.

Q. Yes. Mr. Pope forgot to file it in time and that was why you were waiting for this $810 payment is that correct?

A. That's correct.

Q. You had a motion to set aside and vacate the judgment?

A. Yes.

Q. And as soon as you learned that the motion was

denied then you paid $810 in one lump sum in the nature of a cashier's check, is that correct?

A. That's correct. (R. 140)

The witness testified further that the $810 he paid had nothing to do with the $3,640.85 support she received from the time he left until she filed her dessertion action. That it figured out she had received $260 a month since separation. (R-141, 142) That he took her support out of his pay and he had each week check stubs showing that he didn't enjoy this money himself. (R-146)

TESTIMONY OF NORMA A. WELLING: *Direct Examination:*

Exhibits B and C are put in evidence consisting of the original complaint; her cross-complaint for separation for 5 years—his reply and entry of denial of divorce. (R-150, 168) She testified he left in August 1965 and has not lived with her since, and she had no money and he made no provision for her support when he left. That she didn't receive any support payments after the two payments in January, 1966 until she got the $810 in October, 1966. (R-169-)

"Q. Now this lawsuit was for support was filed on October 26th, 1966, of, on that date had you received any support from the plaintiff for the previous nine months?

A. No." (R.-171)

CROSS-EXAMINATION OF NORMA A. WELLING

"Q. Now you did take out of the bank when you separated on August the 16th, 1965, you took out all the life savings did you not?

Q. Is that correct?

A. I took it all out on Monday morning of August the 16th I think you'll find out instead of the 15th.

Q. Yes you withdrew every thing you had isn't that correct?

A. Yes, and placed it in another bank.

Q. Did you put your husband's name on that bank account?

A. It was Mr. or Mrs. and I put my own on it. (R-173)

Q. Yes, and did you tell him where the money went?

Q. He never asked me. I never had any contact with him. (R-174)

Q. Then on October 26, 1966, after you had taken the monies out of the bank and had the use of the home and two cars you filed this complaint for support, did you not in the Marion Superior Court charging your husband, saying that thereafter Donald F. Welling, and thereafter means the 14th day of August '65, has refused and failed to pay any support to this plaintiff or to make any provisions for support of this plaintiff, is that correct?

A. No, that isn't correct because I didn't have the use of two cars.

Q. You didn't file it, you didn't file this?

A. Yes I filed that but you said I had the use of two cars and I didn't have.

Q. Alright then outside of the two cars, let's forget those, did you file this, other than the use of the

two cars, did you have the money that you spoke of out of the bank and the home and the use of it.

A. What the Court gave me $75 a week, Yes.

Q. Yes, well that came to almost $2,000 didn't it?

A. Well, the Court gave it to me $75 (R-177) a week. (R-178)

IN THE

APPELLATE COURT OF INDIANA

Norma A. Welling, *Appellant,* v. Donald F. Welling, *Appellee.*	No. 1267-A-110 FILED JUL 31 1969 Kendal E. Mathews Clerk of the Indiana Supreme and Appellate Courts

PRAECIPE FOR RECORD

Donald F. Welling, the Appellee in the above cause respectfully requests the Clerk of the Supreme and Appellate Court to prepare and certify the entire record of the above cause in the Appellate; including but not limited to, the Transcript from Boone County; one certified copy of all briefs and Motions and other Pleadings; the Appellate Court Decision; the Motion For Rehearing; the denial of the Motion For Rehearing; the Petition To Transfer To The Supreme Court of Indiana; the Denial of the Petition To Transfer; the Appellee's Petition For Transcript and Notice of Appeal; and a copy of this Praecipe for Record; all to be certified and transmitted to the Clerk Of The Supreme Court of the United States, Washington, D.C.

20543; and to arrive there not later than September 1st, 1969.

Attorney for appellee.